



Recommendation 88-4

Deferred Taxation for Conflict-of-Interest Divestitures

(Adopted June 9, 1988)

Individuals appointed to government positions are sometimes required to divest themselves of property to satisfy conflict-of-interest requirements, such as the prohibition in 18 U.S.C. 208 on participation in matters affecting one's financial interest. In other instances, divestiture of property by such appointees would be simpler and serve conflict-of-interest purposes better than the establishment of qualified blind trusts or subsequent and sometimes frequent recusals by an official from participation in particular decisions. In addition, persons serving in the government occasionally are required to divest themselves of property before accepting a new position or as a condition to participating in a particular matter.

Divestiture of property to avoid conflicts of interest will often result, under current law, in financial losses in the form of taxation of the gains realized as a result of divestiture. The Administrative Conference believes that this tax burden is a disincentive to individuals who would otherwise accept a federal appointment, and in the case of present officials, an unnecessary burden resulting from their performance of official responsibilities. The adverse effects of this disincentive to government service are most acute with respect to the most senior positions involving major policymaking roles. Failure to obtain the best people for those positions, or the frequent recusals of people in those positions, may have serious adverse consequences on both the individuals involved and the government.

The Conference accordingly recommends that Congress amend the Internal Revenue Code to permit deferred taxation of gains for presidential appointees subject to Senate confirmation and other individuals entering the government to accept high level executive branch positions, whenever they are requested or ordered by an appropriate authority to divest themselves of property to avoid actual or potential conflicts of interests. The Conference also recommends that Congress consider amending the Code to extend similar tax treatment to persons serving in the executive branch.¹

¹ This recommendation is limited to executive branch appointees and employees because the Conference by statute is limited to studying and recommending improvements to administrative procedure, 5 U.S.C. 571-576. The Conference, therefore, takes no position on whether or not similar tax treatment should be accorded to officers of the judicial branch.



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The Conference proposes that this defined class of persons be permitted to sell such property and to place the proceeds in a neutral investment vehicle and maintain their original basis in the divested property. Taxation would not be eliminated by this proposal, but only postponed until the individual ultimately disposes of the proceeds of a reinvestment vehicle. The Conference also suggests specific factors and other matters to be taken into account in amending the Code to accomplish these purposes.

The Conference believes that revenue impact of the recommendation will be minimal considering the narrow class of persons that would be eligible for tax deferral.

Recommendation

1. Congress should amend the Internal Revenue Code to permit presidential appointees who are subject to Senate confirmation and other officials entering the government to accept high level executive branch appointments, to divest property, such as securities, and reinvest the proceeds in a neutral investment vehicle and thereby defer realization of taxable gains.

2. Such amendment should take into account the following factors:

(a) The need to assure that the divestiture is undertaken to avoid actual or potential conflicts of interests, by conditioning the deferral on an order or request of the President (or his delegate such as the White House Counselor or the Director of the Office of Government Ethics);

(b) The need for divestiture by spouses, dependent children, and others whose assets may be imputed to the federal official for conflict-of-interest purposes, by making deferral available to them also; and

(c) The need to assure that the reinvestment vehicle avoids conflicts of interests with respect to the position to be held, by having the person ordering or requesting divestiture approve the vehicle.

3. Congress should consider whether the amendment should contain provisions dealing with the following matters:

(a) A minimum period of required government service after divestiture to qualify for deferral;



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(b) Requiring the appointee to defer gains or losses for all property within the class of divested property (*e.g.*, all energy stock), in order to prohibit the appointee from recognizing losses and deferring gains;

(c) Permitting the appointee a second deferral on leaving government service (or within a brief period of time thereafter) if the appointee chooses to dispose of the neutral investment held during government service in order to make another investment.

4. The Conference recognizes that other persons serving in the executive branch may be ordered or requested to divest specific property in order for them to perform their duties free of actual or potential conflicts of interest, and believes that Congress should also consider, at the appropriate time, whether to extend similar tax treatment to them.

Citations:

53 FR 26029 (July 11, 1988)

__ FR ____ (2011)

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Note:

This recommendation was implemented by the Ethics Reform Act of 1989, Pub. L. 101-194, 103 Stat. 1716.